BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY D. MCINTOSH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,022,693
CIP CONSTRUCTION CO., LLP	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the July 20, 2006, Award entered by Administrative Law Judge Kenneth J. Hursh. The Workers Compensation Board heard oral argument on October 25, 2006.

APPEARANCES

Michael J. Haight of Kansas City, Missouri, appeared for claimant. Steven J. Quinn of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a January 4, 2005, accident and resulting injury. In the July 20, 2006, Award, Judge Hursh determined claimant was an employee of the respondent on the date of accident. The Judge then awarded claimant benefits for a 30 percent permanent partial general disability under K.S.A. 44-510e.

Respondent and its insurance carrier contend Judge Hursh erred. They argue claimant was a partner rather than an employee of the respondent and, therefore, claimant is not entitled to receive workers compensation benefits. In the alternative, they argue

claimant should be estopped from claiming that he was an employee. Consequently, they request the Board to reverse the Award.

Conversely, claimant contends the July 20, 2006, Award should be affirmed.

The only issues before the Board on this appeal are:

1. Was claimant working for respondent as an employee when the accident occurred or, instead, was he a partner who had failed to elect coverage under the Workers Compensation Act?

2. If claimant was working for respondent as an employee, should he be estopped from claiming he was an employee as he benefitted from the arrangement that treated him as a limited partner?

The parties agree that if claimant's accident is compensable under the Workers Compensation Act, claimant would be entitled to receive benefits for a 30 percent permanent partial general disability under K.S.A. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be slightly modified to correct the computation of benefits. Otherwise, the Award should be affirmed.

On January 4, 2005, claimant fell from an icy roof he was working on for respondent, a residential framing company. Respondent and its insurance carrier do not contest that claimant was injured while working for respondent. Rather, they contend claimant was a partner instead of an employee of the company and, therefore, he is not entitled to receive workers compensation benefits for his injuries.

On approximately August 28, 2002, both claimant and Merle Lemmon, who represented respondent as its managing partner, executed a document entitled Partnership Agreement. That document provided, in pertinent part:

> 1. I [claimant] will be a non-voting 5% partner of the Partnership. I give the Managing Partner the authority to make decisions for the Partnership and to manage the Partnership.
>
> . . . .

> 3. I "opt-out" of Workers' Compensation, and General Liability offered by the Partnership, and agree to provide my own as prescribed by law. We have discussed, and I understand I am responsible for my own Workers' Compensation Insurance as well as all other insurance.
>
> 4. I am responsible for all personal and medical insurance (medical, disability, etc.) as both an individual and as a member partner.
>
> 5. I will provide tools and equipment as needed to perform the jobs as directed by the Managing Partner. If I am to be reimbursed for the use of my equipment, it will be noted on the back of this agreement. In addition, the K-1 will reflect the reimbursement.
>
> 6. I will be responsible for all my income taxes as an individual, and as a partner in this Partnership.
>
> 7. I will receive moneys from the Partnership as determined by the Managing Partner for each project I participate in as a Partner.
>
> 8. I understand and agree that I will complete the needed information for the Partnership before I am accepted as a member Partner and receive any money for my participation in the Partnership. I further agree that if I do not fulfill my duties as a partner, the managing partner has authority to not allow me to participate in future projects of the Partnership.[1]

According to Mr. Lemmon, C.I.P. stands for Cooperative Individual Partners, which he created as a partnership after consulting with his accountant. In fact, the accountant provided respondent with the written partnership agreement.

Claimant would not have been retained to work for respondent if he had not signed the agreement. Claimant believed the others who worked for respondent signed similar agreements. Claimant believes he signed a similar document in 2003 and probably did so in 2004. But he does not believe he had signed one in 2005 before his January 4, 2005 accident. And Mr. Lemmon described the document signing ceremony, as follows:

> Basically the time before I write checks to anybody, I give them the agreement, tell them to read it, and that one [item 2 of the agreement that authorizes the partnership to withhold monies to purchase general liability and workers compensation insurance] is no. If they don't want me to withhold money for

[1] P.H. Trans., Cl. Ex. 1.

> workers' compensation, to put no in that box, and answer yes to all the rest of the questions if they want to work there.[2]

When individuals became partners of C.I.P., they were not required to buy into the company. Mr. Lemmon was the only person who contributed any capital to C.I.P. Mr. Lemmon also testified that anyone who wanted to work at C.I.P. had to sign a partnership agreement. The percentages of partnership ownership recited in the various agreements meant nothing to Mr. Lemmon or those who signed the agreement.

When claimant began working for respondent, he considered himself to be an employee. Although he had anticipated staying for only a few months, claimant continued to work for respondent for more than two years. Mr. Lemmon supplied tools such as power saws and nail guns. Claimant, on the other hand, used his own hammer and used his own nail gun a few times.

But Mr. Lemmon directed the work that was performed by claimant. Mr. Lemmon assigned the jobs and told claimant when to show up at the job site and when to leave. In short, Mr. Lemmon was the boss. Other than a seldom small side job, claimant did not work for anyone else while working for respondent.

Claimant worked full-time for respondent and was paid $20 per hour. Respondent did not withhold or deduct any taxes from claimant's checks. Claimant was never given any monies that represented profits from respondent's business operations nor did he ever receive a demand for payment of respondent's liabilities. The record is unclear whether claimant has paid taxes on the income he earned working for respondent.

Before forming C.I.P, Mr. Lemmon operated a framing business, MK Lemmon Framing, which at times withheld payroll taxes and purchased workers compensation insurance and at other times operated similar to respondent. The reason Mr. Lemmon started C.I.P. was to cut the costs associated with payroll taxes and workers compensation insurance. And at the time of his June 2006 deposition, Mr. Lemmon was president of Kansas City Construction Management (KCCM). According to Mr. Lemmon, KCCM is "pretty much" the parent company of C.I.P. KCCM receives the money for the work that C.I.P. performs and then filters the money down to C.I.P. to pay its workers.

Mr. Lemmon maintained workers compensation insurance coverage in order to provide a certificate of insurance to general contractors. The documents introduced at preliminary hearing indicate that he had purchased workers compensation insurance coverage for CIP Construction LLP and Merle and Susie Lemmon, for the period from

[2] *Id.* at 24.

November 2, 2004, to November 2, 2005. The documents, however, identify only Merle and Susie Lemmon as partners of respondent. Moreover, the documents indicated that Merle and Susie Lemmon were excluded from coverage.

After recovering from the January 4, 2005, accident, claimant obtained new employment. Claimant now works at a distribution center and part-time for a framing company. As indicated above, the parties agree claimant should receive benefits for a 30 percent permanent partial general disability in the event claimant has coverage under the Workers Compensation Act.

With some exceptions, employers are liable for workers compensation benefits when an employee sustains personal injury by accident arising out of and in the course of employment.[3] The Act defines both "employer" and "employee." More importantly, the Act specifically states that "individual employers, limited liability company members, partners or self-employed persons" are not employees, unless a valid election was filed to procure coverage under the Act.[4]

In addition, as cited by the Judge, K.A.R. 51-21-1 provides that an employer cannot contract with an employee to waive the employer's liability under the Workers Compensation Act.

This is not the first time an employer has attempted to evade its responsibilities under the Workers Compensation Act by alleging that a partnership agreement prevented an injured worker from receiving benefits. In *Herrera*,[5] the Kansas Supreme Court held that parties may designate the nature of their relationship, but that designation does not determine its true legal character.

> The mere designation of a relationship by the parties as a partnership does not determine its true legal character. The conduct of the parties is far more significant than the name they used to describe the nature of their relationship. In this case the evidence clearly establishes that Herrera was really no more than a mud tender or bricklayer's helper, subject to the orders and supervision of Kemper and, since there is no evidence of any sort of a formal partnership agreement or any other factors tending to show an actual partnership between Herrera and Kemper, we believe the trial court was justified in finding the existence of an employer-employee relationship, rather than that of a partnership. Without pursuing the subject further

---

[3] K.S.A. 44-501(a).

[4] K.S.A. 2004 Supp. 44-508(b).

[5] *Herrera v. Fulton Construction Co.*, 200 Kan. 468, 436 P.2d 364 (1968).

> it is sufficient to say there is substantial competent evidence in this record to support the finding of the trial court that claimant was an employee within the protection of the Workmen's Compensation Act.[6]

And in *Knoble*,[7] the Kansas Supreme Court further explained that the overall conduct of the parties determines whether a worker is an employee for purposes of the Act.

> [T]he relationship of contracting parties depends on *all* the operative facts; the label which they choose to employ is only one of those facts. Parties are free to contract as they please, but mere terminology cannot bind a court or prevent it from assessing the effect of the overall conduct of the parties.[8]

The Board concludes the partnership agreement was a sham to attempt to avoid paying payroll taxes and purchasing workers compensation insurance. Mr. Lemmon directed and controlled claimant's work, told claimant when to arrive at the job site and when to leave, retained the authority to fire claimant, and paid him an hourly rate. For purposes of the Workers Compensation Act, claimant was an employee.

The Board rejects respondent's argument that claimant should be estopped from asserting he is an employee. First, estoppel is an equitable remedy and respondent lacks clean hands. Second, the facts do not establish that claimant derived any real benefit from the alleged partnership arrangement. Mr. Lemmon did not agree that he paid claimant a higher hourly rate due to the alleged partnership.[9] And the Board is not persuaded that claimant's tax liability would have been less as a partner rather than an employee. Generally, a partner or self-employed individual is responsible for the share of payroll taxes an employer would otherwise pay. Finally, the facts are distinguishable from *Marley*[10] as the worker obtained benefits under an insurance contract by representing that he was a self-employed individual and then sought to obtain benefits under the Workers Compensation Act as an employee.

---

[6] *Id.* at 473 (citations omitted).

[7] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[8] *Id.* at 337.

[9] Lemmon Depo. at 29.

[10] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, *rev. denied* 269 Kan. 933 (2000).

In summary, respondent has failed to establish it is entitled to equitable estoppel. And the finding granting claimant benefits for a 30 percent permanent partial general disability under K.S.A. 44-510e should be affirmed, but the computation of the benefits should be slightly modified.

Respondent and its insurance carrier argue the Board determined in an appeal of a preliminary hearing order claimant elected to be a partner and, therefore, should be barred from receiving workers compensation benefits. The Workers Compensation Act provides that preliminary hearing decisions, which may be decided by only one Board Member, are not final but subject to modification upon a full presentation of the claim when all five Board Members participate in rendering the decision.[11] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 20, 2006, Award entered by Judge Hursh to correct the computation of benefits.

Larry D. McIntosh is granted compensation from CIP Construction Co., LLP, and its insurance carrier for a January 4, 2005, accident and resulting disability. Based upon an average weekly wage of $800, Mr. McIntosh is entitled to receive 26 weeks of temporary total disability benefits at $449 per week, or $11,674, plus 121.20 weeks of permanent partial general disability benefits at $449 per week, or $54,418.80, for a 30 percent permanent partial general disability. The total award is $66,092.80.

As of December 15, 2006, Mr. McIntosh is entitled to receive 26 weeks of temporary total disability compensation at $449 per week, or $11,674, plus 75.43 weeks of permanent partial general disability compensation at $449 per week, or $33,868.07, for a total due and owing of $45,542.07, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $20,550.73 shall be paid at $449 per week until paid or until further order of the Director.

Future medical benefits may be considered upon proper application to the Director.

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel

[11] See K.S.A. 44-534a(a)(2); K.S.A. 2005 Supp. 44-555c(k).

desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge